United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

77-4090

IN THE UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

PLEASE RETURN TO
RECORDS ROOM

DOCKET NO. 77-4090

SEVERINO R. NICO, JR. and TERESITA V. NICO,

Petitioners-Appellants,

-against-

COMMISSIONER OF INTERNAL REVENUE,

Respondent-Appellee.

ON APPEAL FROM THE UNITED STATES TAX COURT

BRIEF FOR PETITIONERS-APPELLANTS

SEVERINO R. NICO, JR.
TERESITA V. NICO
7 East 14th Street, #625
New York, New York 10003

UNITED STATES COURT OF APPEALS
FILED
JUN 23 1977
A. DANIEL FUSARO, CLERK
SECOND CIRCUIT

TABLE OF CONTENTS

	Page
PRELIMINARY STATEMENT	1
QUESTIONS PRESENTED	2
STATEMENT OF FACTS	3
ARGUMENTS	8
1. Petitioners may elect standard deduction	8
POINT I	
Petitioners' 1971 Return is for a short period as required by Section 443(a)(2)	8
POINT II	
Assuming, alternatively, that Petitioners' taxable year is the calendar year, only non-resident alien taxpayers are ineligible to elect standard deduction under Section 142(b), and only with respect to their income earned as non-resident aliens pursuant to Reg. Section 1.871-13	13
2. Moving expenses from Manila to San Francisco are allowable deductions . . .	21
CONCLUSION	30

Cases:	Page
Aguilar v. United States, 501 F. 2d (5th Cir. 1974)	11
Bunnel, Robert L., 50 T.C. 837 (1968)	11
Foran, et al. v. Commissioner of Internal Revenue, 165 F. 2d 705 (5th Cir. 1948)	26, 28
J. H. Robinson Truck Lines v. Commissioner of Internal Revenue, 183 F. 2d 739 (1950)	27, 28
Jose E. More, 66 T.C. 27 (1976)	13
Statutes:	
Internal Revenue Code of 1954	
Section 142(b)	2, 7, 14, 17, 20
Section 217(c)	2, 8, 21
Section 441	9
Section 443(a)(2)	8, 9, 10
Section 871	17
Section 1372(b)(1)	11
Section 7421	11
Section 7701(a)(14)	10, 11, 12, 13, 14, 20
Regulations	
Section 1.217(c)(3)	22
Section 1.443-1(a)(2)	10
Section 1.871-13	13, 15, 16

Congressional Reports — Page

Report, Senate Committee on Finance
No. 885, 78th Congress, 2d Session,
on the Individual Income Tax Bill
of 1944, p.22 13

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SEVERINO R. NICO, JR. and TERESITA V. NICO, Petitioners-Appellants,	:	
v.	:	Docket No. 77-4090
COMMISSIONER OF INTERNAL REVENUE, Respondent-Appellee.	:	

BRIEF FOR PETITIONERS-APPELLANTS

PRELIMINARY STATEMENT

The findings of fact and opinion of the Tax Court are by a regular opinion, 67 T.C. No. 48. The opinion is by the Trial Judge, Honorable Cynthia Holcomb Hall.

The case involves deficiencies in Federal income tax determined against petitioners-appellants (hereinafter "petitioners") Severino R. Nico, Jr. and Teresita V. Nico for the taxable year 1971 in the total amount of $454.73. The deficiencies are based in part on a determination by the Commissioner of Internal Revenue that: (1) petitioners were not eligible to elect the standard deduction; and (2) their moving expenses from Manila, Philippines to San Francisco, California were disallowed.

Trial was held before Judge Hall at New York, New York on December 2, 1975. The case was submitted for adjudication upon a Stipulation of Facts with Exhibits, a Supplemental Stipulation of Facts with Exhibits, testimony at the trial by petitioner Severino R. Nico, Jr. and certain facts of which petitioners requested the court below to take judicial notice.

The court below determined inter alia that petitioners were nonresident aliens part of 1971 and hence not eligible to elect standard deduction under Section 142(b)*; that petitioners made San Francisco their new principal place of work and by moving to New York City after working for less than 39 weeks in San Francisco as required by Section 217(c) are not entitled to moving expenses from Manila to San Francisco.

QUESTIONS PRESENTED

1. Whether petitioners were eligible to elect the standard deduction in their 1971 income tax return.

2. Whether petitioners' moving expenses from Manila to San Francisco are allowable deductions.

---

* All section references, unless otherwise indicated, are to the Internal Revenue Code of 1954, as amended (the "Code").

STATEMENT OF FACTS

Petitioners, husband and wife, resided in New York, New York at the time they filed their petitions with the Tax Court. (Stipulation of Facts "Stip." par. 1). They timely filed a joint income tax return, Form 1040, for the taxable year 1971 reporting incomes earned by them as employees while residing at 676 Geary Street, Apt. 405, San Francisco, California and at 7 East 14th Street, New York, New York, and no other incomes (Stip. 2, Exhibit 1-A).

Prior to May 2, 1971, petitioners were Philippine nationals neither of whom had ever been to the United States. (Stip. 3 and Supplemental Stipulation of Facts "Supp. Stip." par. 18). Petitioners emigrated from the Philippines during April of 1971 with the intention of residing permanently in New York City. (Stip. 4, Transcript "Tr." p. 11, Lines "L." 10-11). Before departing, they sold their furnitures and appliances and deposited the proceeds in an account in the First United Bank in Manila, which account contained petitioners' savings in Philippine money. (Tr. 8). Due to currency restrictions in the Philippines, Philippine Government authorities allowed the petitioners to leave Manila with only $500 each. (Supp. Stip. 21, Exh. 5). However, the First United Bank in Manila sought permission to remit their assets

to them in dollars in the United States. (Tr. 12, L. 8-9; Tr. 28-29). Petitioners shipped one box of clothings and personal effects by boat bound for San Francisco, the nearest seaport in the United States mainland and along the way from Manila to New York City. (Supp. Stip. 20, 4, Tr. 11, 22-23). Among the clothings in this box are petitioner Severino's thick suits, suitable for winter and not for use in San Francisco. (Tr. 23, L. 20-22).

Petitioner Severino is a member of the Philippine Bar and was employed as an attorney with the United States Veterans Administration in Manila, Philippines until he resigned on April 19, 1971. (Supp. Stip. 23 & 24, Exh. 7 & 8). Petitioner Teresita was also employed with the same United States agency in Manila as a Contact (Claims) Representative until she resigned on April 12, 1971. (Supp. Stip. 25, Exh. 9).

On April 23, 1971, petitioners departed Manila by plane, stayed a few days each in Taipei, Taiwan and Tokyo, Japan and arrived in Honolulu, Hawaii on May 2, 1971. (Stip. 4). On May 4, 1971, they departed Honolulu by plane and arrived in San Francisco on the same day. (Stip. 5).

In San Francisco, petitioners lodged at Manx Hotel and were billed for two nights lodging $46 from May 4

to May 6. (Stip. 15). On May 6, they signed a four month lease and moved into a furnished apartment at 676 Geary, Apt. 405, San Francisco, for which they paid a monthly rent of $135. (Supp. Stip. 19, Tr. 27, L. 23-24).

Petitioners wrote their bank in Manila, the First United Bank, to remit their assets to them at their furnished apartment in San Francisco. (Tr. 12, L. 8-9). As former employees of the United States government, they wrote the Civil Service Commission in Washington, D.C. requesting the withdrawal of their retirement contributions. (Tr. 12, L. 11-18). They received their Alien Registration Cards (green cards) at about this time in San Francisco. (Tr. 24).

On May 14, 1971, petitioner Teresita began working with the California Blue Shield in San Francisco. (Stip. 8).

On May 17, 1971, petitioners' box containing personal and household effects which they shipped in Manila arrived by boat in San Francisco. (Supp. Stip. 20, Exh. 4, Tr. 11, L. 11-18).

Sometime in June, 1971, a check dated June 2, 1971 in the amount of $499.67 was received from the Civil Service Commission by petitioner Teresita at their furnished apartment at 676 Geary, Apt. 405, San Francisco. (Stip. 17 and

Exh. 3-C).

Sometime in June 1971, petitioner Severino was Employed for two days by Anthony Enterprises, San Francisco, California. (Stip. 6). Later, on June 23, he began working with the State Compensation Insurance Fund of California. (Stip. 7).

Sometime in July, 1971, a check dated June 30, 1971 in the amount of $2,623.48 was received from the Civil Service Commission by petitioner Severino at their furnished apartment at 676 Geary, Apt. 405, San Francisco. (Stip. 16, Exh. 2-B).

Sometime in July and/or August, 1971, petitioners received two checks each for $400 from the First United Bank in Manila representing the proceeeds of the sale of their furnitures and savings in Manila. (Tr. 28-29).

Petitioner Teresita resigned from the California Blue Shield effective August 14, 1971. (Stip. 8).

Petitioner Severino resigned from the California State Compensation Insurance Fund effective August 23, 1971. (Stip. 7).

On August 29, 1971, petitioners boarded a Greyhound bus and with all their belongings, left San Francisco, arriving in New York City on September 6, 1971. (Stip. 9, Tr. 23, L. 2-6).

Neither of the petitioners had secured employment in New York City prior to their departure from San Francisco. (Stip. 10).

On September 14, 1971, petitioner Teresita began work in New York City with Simpson Thacher & Bartlett and her employment there has been continuous since then. (Stip. 12).

On October 1, 1971, petitioners moved from their hotel to their permanent residence at 7 East 14th Street, New York, New York. They then bought all their furnitures and appliances in New York. (Tr. 17, L. 15-17).

On October 14, 1971, petitioner Severino began working with LeBoeuf Lamb Leiby & MacRae, a law firm in New York City, up to October 4, 1971. (Stip. 11, Tr. 29, L. 24-25).*

Based on the above and other facts recited in the opinion, the Court below made an ultimate finding that petitioners were nonresident aliens before their arrival in the United States on May 2, 1971 and under Section 142(b) were not eligible to elect the standard deduction on their incomes earned as resident aliens since said date.

The court below also found that San Francisco became a new principal place of work for the petitioners and by moving

---

* Upon passing the New York Bar Examination, Severino became a member of the New York Bar on October 7, 1974. Both petitioners became United States citizens on November 24, 1976.

to New York City before working for 39 weeks in San Francisco failed to satisfy the condition under Section 217(c) and were not entitled to moving expenses from Manila to San Francisco.

ARGUMENTS

1. PETITIONERS MAY ELECT STANDARD DEDUCTION

POINT 1

PETITIONERS' 1971 RETURN IS FOR A SHORT PERIOD AS REQUIRED BY SECTION 443(a)(2) COMMENCING UPON THEIR ARRIVAL IN THE UNITED STATES ON MAY 2, 1971 UP TO DECEMBER 31, 1971 AND DURING SUCH PERIOD THEY WERE RESIDENT ALIENS.*

Petitioners arrived in the United States on May 2, 1971 as immigrants and therefore under the Code as resident aliens. The Wage and Tax Statement (W-2) attached to their return for 1971, Exhibit 1-A, indicate that all income declared by them were earned during their residence at 676 Geary, Apt. 405, San Francisco, California and at 7 East 14th Street, New York, New York. No other incomes were declared. Neither one of the

---

* Based on this argument, petitioners also contend that they may elect to file a joint return for 1971.

petitioners had been to the United States nor had either one earned taxable income under the Code prior to May 2, 1971. They had no status as taxpayers prior to May 2, 1971 and their 1971 return was their first return. Under Section 443(a)(2) their taxable year must commence on May 2, 1971 and not on January 1, 1971.

Section 441 provides as follows:

> "(a) - Computation of Taxable Income. - Taxable income shall be computed on the basis of the taxpayer's taxable year.
>
> (b) - Taxable year. For purposes of this subtitle, the term "taxable year" means -
>
> (1) the taxpayer's annual accounting period, if it is a calendar or fiscal year;
>
> (2) the calendar year, if subsection (g) applies; or
>
> (3) the period for which the return is made, if a return is made for a period of less than 12 months." (underlining supplied)

Section 443 of the Code provides:

> "(a) Returns for a short period. - A return for a period of less than 12 months (referred to in this section as "short period") shall be made under any of the following circumstances:
>
> . . .

> (2) Taxpayer not in existence for taxable year. When the taxpayer is in existence during only part of what would otherwise be his taxable year."

Short period returns are required of new taxpayers filing their first returns and of taxpayers ending their existence. The rule applies to organizations and individuals alike. (See Regulations "Reg." section 1.443-1(a)(2).

The term "taxpayer" is defined by Section 7701-(a)(14):

> "(a) When used in this title, where not otherwise distinctly expressed or manifestly incompatible with the intent thereof -
>
> . . .
>
> (14) TAXPAYER. - The term "taxpayer" means any person subject to any internal revenue tax." (underlining supplied)

Since petitioners, prior to their arrival in the United States on May 2, 1971, were nonresident aliens who did not have any taxable income under the Code, they were not subject to any internal revenue tax and were not "taxpayers in existence" at the time. Consequently, they were "taxpayers in existence" only during part of what would otherwise be their taxable year and required to file a short return covering the period from May 2, 1971 to December 31, 1971 under Section 443(a)(2).

This court had occasion to apply the Code's definition of a taxpayer with respect to a nonresident alien individual. In Aguilar v. United States, 501 F. 2d 127 (5th Cir. 1974), the Court was confronted with the question whether a nonresident alien individual had a right to show that the seizure of his property pursuant to a jeopardy assessment was arbitrary and capricious and thus obtain injunctive relief in spite of the provisions of Section 7421. In holding in favor of the nonresident alien individual, the Court stated:

> "Appellant is a citizen and a resident of Mexico. He owns a trucking business which he operates exclusively in the Republic of Mexico. He did all of his business in Mexico and was not a taxpayer (citing Section 7701(a)(14)) within the meaning of the Code, had no duty to file a return and had no income subject to taxation by the United States." Id. at 129 (emphasis supplied)

In Robert L. Bunnel, 50 T.C. 837 (1968), several individuals owned a corporation and made an election under Subchapter S of the Code, the effect of which was to treat the corporation as a non-taxable conduit with the shareholders deemed the taxpayers. The Government issued statutory notices of deficiency against the individual shareholders, but not against the corporation. The individual shareholders argued that since the corporation

was not served timely with a notice of deficiency, the statute of limitation had expired and the notices of deficiency to them were invalid. The Government contended that since Section 1372(b)(1) provides that an electing Subchapter S corporation "shall not be subject to the taxes imposed by this chapter" (underlining supplied), that the corporation was not a "taxpayer" within the meaning of the relevant Code section. The Tax Court, referring to the definition of taxpayer in Section 7701(a)(14), found that a technical application of that provision might require that the Subchapter S corporation be termed a "taxpayer" within the meaning of Section 7701(a)(14) because the Subchapter S election "did not extend its freedom from tax to every 'internal revenue tax'; it still remained liable for other taxes imposed by the Code - for example, social security taxes payable with respect to its employees". Id. at 841. The Tax Court, however, held that the Subchapter S corporation was not the "taxpayer" and that the deficiency notices fully satisfied the statutory requirements.

Thus, the Fifth Circuit in Aguilar clearly held that a nonresident alien individual with no income taxable under the Code was not a taxpayer within the meaning of Section 7701(a)(14). In Bunnel, the Tax Court went even

further by holding that a domestic corporation not subject to income tax was not a taxpayer within the meaning of the said provision, even though it might be "subject to" other internal revenue taxes.

The court below held that petitioners herein were not "taxpayers not in existence" under Section 443(a)(2) and that their taxable year was the calendar year starting on January 1, 1971 to December 31, 1971. Instead of refuting petitioners' argument, the court below relied exclusively upon the court's decision in Jose E. More, 66 T.C. 27 (1976) also on appeal (2nd Cir. October 22, 1976), although it was noted in the opinion of this (Nico) case that Jose E. More did not invoke Section 443(a)(2) but conceded that he was not a taxpayer "not in existence" under said provision of the Code.

POINT II

ASSUMING, ALTERNATIVELY, THAT PETITIONERS' TAXABLE YEAR STARTED ON JANUARY 1, 1971 TO DECEMBER 31, 1971, ONLY NONRESIDENT ALIEN TAXPAYERS ARE INELIGIBLE TO ELECT STANDARD DEDUCTION UNDER SECTION 142(b), AND ONLY WITH RESPECT TO THEIR INCOME EARNED AS NON-RESIDENT ALIENS PURSUANT TO REG. SECTION 1-871.13.

Section 142 is the basis of the Commissioner's

action in denying the petitioners the election of standard deduction. It provides:

> "INDIVIDUALS NOT ELIGIBLE FOR STANDARD DEDUCTION:
>
> . . .
>
> (b) CERTAIN OTHER TAXPAYERS INELIGIBLE - The standard deduction shall not be allowed in computing the taxable income of -
>
> (1) a nonresident alien individual;
> . . ." (underlining supplied)

This provision, originally in Section 9 of the Individual Income Tax Act of 1944, was enacted because "such taxpayers (nonresident aliens) are subject to special provisions of the statute not adaptable to the method of taxation employed in supplement T (standard deduction)." Report, Senate Committee on Finance No. 885, 78th Congress, 2d Session, on the Individual Income tax Bill of 1944, p. 22.

It is clear that only nonresident alien taxpayers are ineligible to elect the standard deduction under this provision of the Code. There would be no point in denying this election to a nonresident alien who is not a taxpayer. As petitioners were not taxpayers within the meaning of Section 7701(a)(14) prior to their arrival in the United States on May 2, 1971, they are not the individuals referred to as ineligible to elect the standard deduction.

The Commissioner and the court below maintain that petitioners are nevertheless dual status taxpayers even if they did not have to pay tax before they arrived in the United States. Assuming further that this is a correct view, still under Reg. Section 1.871.13(a)(1), petitioners should be allowed to elect the standard deduction. That Regulation provides:

> "TAXATION OF INDIVIDUALS FOR TAXABLE YEAR OF CHANGE OF U.S. CITIZENSHIP OR RESIDENCE.
>
> (a) IN GENERAL. (1) An individual who is a citizen or resident of the United States at the beginning of the taxable year but a nonresident alien at the end of the taxable year, or a nonresident alien at the beginning of the taxable year but a citizen or resident of the United States at the end of the taxable year, is taxable for such year as though his taxable year were comprised of two separate periods, one consisting of the time during which he is a citizen or resident of the United States and the other consisting of the time during which he is not a citizen or resident of the United States. Thus, for example, the income tax liability of an alien individual under Chapter 1 of the Code for the taxable year in which he changes his residence will be computed under two different set of rules, one relating to resident aliens for the period of residence and the other relating to nonresident aliens for the period of nonresidence. However, in determining the taxable income for such year which is subject to the graduated rate of tax imposed by Section 1 or 1201 of the Code, all income for the period of U.S. citizenship or residence must be aggregated with the income for the period of nonresidence which is effectively connected for such year with the conduct of a trade or business in the United States."

Obviously, if Congress does not allow non-resident alien taxpayers to elect standard deduction because their tax liabilities are determined by some other standard than the general gross income provisions of the Code, there is no reason for disallowing taxpayers the use of the standard deduction on incomes which they earned as resident aliens. Since the burden of taxation by a citizen and resident alien is greater than that of the nonresident alien, it would not be fair to deny them the use of the standard deduction with respect to income earned as resident or citizen. It will be noted that petitioners' incomes (Exhibit 1-A) were all earned while they were resident aliens, and they did not have any income taxable under the Code prior to their arrival in the United States on May 2, 1971 during which time they were considered by the Commissioner as nonresident alien taxpayers.

The court below was initially impressed that under this Regulation petitioners should be allowed to elect standard deduction. However, upon observation that the examples in the Regulation indicated that specific deductions and not standard deductions were used although such use seem favorable to the taxpayer, the court ultimately

decided that upon the Commissioner's expressed policy, petitioners cannot elect standard deduction.

Section 871 of the Code which the above quoted Regulation implements is the leading provision in Subpart A, Part II, entitled "Nonresident Alien Individuals". Its heading is "Tax on Nonresident Alien Individuals". Section 1.871-13 of the Regulations provides the rules on dual status taxpayers, i.e., nonresident alien taxpayers who become resident alien taxpayers or vice-versa in the same taxable year. Section 1.871-13(a), the above-quoted Regulation, gives the general rule; 1.871-13(b) provides a specific rule on income earned as nonresident alien but received as resident aliens; 1.871-13(c), the reverse of (b), providing rule on how to treat income earned as resident alien but received as nonresident alien; 1.871-13(d) special rules, (1) method of accounting, (2) deductions for personal exemptions, (3) exclusion of dividends received; and 1.871-13(e) Illustrations: Example (1) illustrates treatment of income earned as nonresident but received as residents; Example (2) illustrates exclusion of dividends received; and Example (3) illustrates the limits of deductions for personal exemptions in (d)(2). None of the specific rules dealt with the

standard deduction. None of the examples were made to illustrate standard deduction of dual status taxpayers. While the use of the standard deduction could be more favorable to the taxpayer in Examples (1) and (2), it was inconvenient for the draftsperson of the Regulation and the examples to do so. In 1967 when the Regulation was to be made effective, the low income allowance could be arrived at only after a complicated computation. The draftsperson had to determine whether to use low income allowance or percentage deduction. He had to determine what the rate was during a particular year because standard deduction rates change almost every year. It was much simpler for the draftsperson to choose a convenient number that will simplify mathematical computations to represent the sum total of itemized deductions. After all, the examples were illustrative of the specific rules in the particular Regulation Section 1-871-13(b) to (d) rather than the above-quoted general rule in Section 1-871-13(a). Petitioners contend that the use of specific deductions in the examples were more for convenience and were not conscious choice or deliberate expressions of policy as the court below concluded.

Moreover, even if the draftsperson is supposed to use the standard deduction if it is more favorable to the

taxpayers, it was not clear in two of the three examples that the standard deduction would indeed be such. In example (1), out of the $10,200 adjusted gross income, $2,000 were earned by the taxpayer as a nonresident alien, hence the draftsperson may not find it advantageous for the taxpayer to use standard deduction on the remaining $8,200 in 1967 when the examples were to be made effective. In example (3), the adjusted gross income during the residence period is $2,000 and the allowable deduction is $250. It is not clear in this example that the standard deduction may be advantageous to the taxpayer considering that in 1967 the standard deduction is not as much as it is in the later and more recent years.

On the other hand, it will be observed that in all the three examples, the dual status taxpayer had taxable incomes both as nonresident alien and as resident alien. If as the court below depended on these examples to determine expressed policy of the Treasury Department or the Commissioner, might it not be fair if the court below also concluded from these examples that dual status taxpayers have income or subject to income tax both as resident aliens and as nonresident aliens - which is not the case herein of the petitioners

who had income in 1971 only as resident aliens, did not have income taxable under the Code as nonresident aliens and - what is more important - not subject to tax, and hence not taxpayers under Section 7701(a)(14) prior to their arrival in the United States on May 2, 1971.

Ascertaining legislative intent rather than administrative policy is the primary function of the courts. Legislative intent behind Section 142(b) is clear: to deny to nonresident alien taxpayers the election of standard deduction because their incomes are computed by other standards than those of citizens and resident aliens. The Commissioner's policy went over and beyond the legislative intent because it denied the election of standard deduction to herein petitioners who were not taxpayers when they were nonresident aliens and who are electing standard deduction only with respect to incomes earned and received as resident aliens. The policy has no basis in the Code, nor in the Regulations nor in logic and equity. Moreover, it is oppressive and harsh to immigrants such as herein petitioners who of all taxpayers need the standard deduction particularly during the year of their arrival in the United States.

2. PETITIONERS' MOVE FROM MANILA DID NOT TERMINATE IN SAN FRANCISCO BUT IN NEW YORK CITY AND THE 39-WEEKS PERIOD REQUIRED BY SECTION 217(c)(2)(A) APPLIES ONLY UPON ARRIVAL IN NEW YORK CITY.

The court below held that by stopping and working in San Francisco, petitioners made San Francisco their new principal place of work and having worked there for less than 39 weeks, they are not entitled to moving expenses from Manila to San Francisco.

Petitioners contend that San Francisco could not have been a principal place of work for the petitioners because their move which commenced in Manila did not terminate in San Francisco but in New York City. They had to stop for three months and 25 days in San Francisco because they had to wait for their box shipped in Manila containing clothings and personal household effects among which are thick suits for winter tailored in Manila (Tr. 11), their alien registration (green) cards which they were not able to get from the Immigration authorities in Honolulu (Tr. 11), their money coming from the United States Civil Service Commission in Washington (Tr. 12) and money coming from the First United Bank in Manila (Tr. 12).

There is nothing in the Code, Regulations or

precedents which decrees that accepting jobs automatically terminates a move. A determination of principal place of work depends upon the taxpayer's intention and the facts and circumstances of the case. (Regulations Section 1.217-1(c)(3)). Prominent among the circumstances of the case is the fact that both petitioners were immigrants from halfway around the world, neither one of whom had been to the United States before their arrival in Honolulu on May 2, 1971. (Supp. Stip. 18).

Petitioner Severino testified under oath at the trial that they left Manila with the intention to reside in New York City permanently. (Tr. 11). Realizing that he cannot regain his attorney position with the Veterans Administration unless he becomes a member of the Bar of a state of the United States, he tried to find out how he could become a member of the Bar without having to attend a law school in the United States. He learned that he could work as a law clerk in a New York law office and qualify to take the New York Bar Examination. (Tr. 13). He obtained a copy of the classified ads of the New York Times while in Manila and he was confident that he could obtain a job as a law clerk in a New York City law firm. (Tr. 13). Petitioners had to stop in San Francisco because they had to wait for their clothings and personal effects

which would have been too expensive to take by plane and which were loaded in a ship bound for San Francisco, the seaport in the United States mainland closest to Manila and which is along the way to New York. They decided to wait for all the other items they needed in San Francisco before proceeding to New York. While waiting for these items (Tr. 11 and 12) in San Francisco, they both took any jobs which were available and left these jobs after they received all the items they waited for in San Francisco.

Petitioner Severino's testimony is unimpeached and uncontradicted by the Commissioner. Documents supported the fact that their personal and household effects were shipped to them by boat and received by them in San Francisco (Exh. 4, Supp. Stip. 20) and the fact that they received in San Francisco their retirement contributions sometime after June 2 and June 30, respectively.

The court below rejected petitioner Severino's testimony that they left Manila with the intention to reside in New York City permanently, holding that "neither petitioner had secured employment in New York City prior to September 1971" and that petitioners did not "stay in San Francisco solely for the purpose of awaiting delivery

of their personal possessions from the Philippines, their alien registration cards, the proceeds of the sale of their furnitures and their retirement contributions". The court below also found that petitioners "began to put down permanent roots in San Francisco" when they found employment there.

That petitioners did not have contracts of employment in New York City before going there does not negate their intention to work and live there. The positions of law clerk and legal secretary which petitioners easily obtained when they arrived there are modest ones. Hirings were done on the spot and after brief interviews. It is impractical and time-consuming for petitioners to obtain employment contracts for these jobs in New York City while in Manila and in San Francisco. It was enough that they know that such positions abound and felt qualified for the jobs. It may be customary for residents to obtain employment contracts before moving to another area but petitioners were newly-arrived immigrants who had no roots elsewhere in the United States at the time.

The court below's observation that petitioners did not "stay in San Francisco solely for the purpose of awaiting delivery of their personal possessions from the Philippines, their alien registration cards, the

proceeds of the sale of their furnitures and their retirement contributions" is absolutely unfounded. Nowhere in the records of this case is an indication or a hint of evidence that petitioners had any other reason for staying in San Francisco.

Likewise, there is no evidence in the record to sustain the court below's finding that petitioners "began to put down permanent roots in San Francisco" when they found employment there. There is no dispute that the apartment that petitioners leased for four months was furnished (Supp. Stip. 19) and that it was taken by the petitioners because of the uncertainty of the time of arrival of the items they waited for and the exorbitant expense of waiting in a hotel where they were billed at $23 a day. (Tr. 12). Petitioners did not move to an unfurnished apartment which would be even less expensive than a furnished one and buy their own furnitures in San Francisco. It was in New York City where they bought all their appliances and furnitures. (Tr. 17). They left San Francisco even before the expiration of their lease but only after they received the items they were waiting for. (Tr. 12). Certainly, renting a furnished apartment cannot by any stretch of imagination be interpreted to be a "beginning of laying down permanent roots".

This case is similar to two cases decided by the 5th Circuit. In the case of Foran, et al. v. Commissioner of Internal Revenue, 165 F. 2d 705, the Court reversed the Tax Court's decision sustaining the Commissioner's assessment of deficiency. The facts are as follows:

> Taxpayer Foran was engaged in the oil and gas royalty and brokerage business for several years wherein he bought and sold oil royalties for others on a commission basis. He also purchased and sold some gas properties in his own name but there is no finding that the latter amounted to a business. The property in controversy was held by Foran for more than eighteen months before he sold them in 1941 and the question arose as to whether the gain realized is a long term capital gain or ordinary gain. Foran's testimony was the only evidence before the court. He testified that he intended to keep this oil-producing property for investment and he never offered it for sale and in fact when he needed money, he mortgaged it to secure a loan which he would pay out of the income of the property in four years; and the only reason he sold it was that due to efforts by large oil companies to alter allocations to Foran's detriment, it was no longer wise to keep it. The Tax Court did not believe Foran's positive testimony that he decided to keep the property for investment when it was yielding an income of $4,800 a year and refused to accept his oath that the sale was caused by the action taken by the large oil companies and justified its opinion by asserting that Foran made no special entry in his books by which this property was handled differently from any other property.

The Court held:

"We know of no requirement to make a separate record of what is to be held for sale and what is not. There is no evidence that Foran had separate records of that sort."

After distinguishing a case cited by the Tax Court, the Court said:

"Here there is direct and positive evidence from the witness who best knows that this property was for eighteen months being held as an investment and not held for sale to customers. His testimony is consistent with every proven fact. He gives a credible reason why it was not for sale and why finally in 1941 he did sell it. We think the court's refusal to follow the sworn testimony is contrary to law, and requires the setting aside of its fact-finding as it would that of a jury."

In J.H. Robinson Truck Lines v. Commissioner of Internal Revenue, 183 F. 2d 739, the Fifth Circuit again reversed a Tax Court decision approving the Commissioner's disallowance of deductions made for salaries and rents paid to its president in determining its income and declared value excess-profits. The petitioners therein had presented its president, Mr. Robinson, and two witnesses who positively testified that the rents and salaries were reasonable. The Commissioner offered no evidence to contradict or impeach said testimonies. The court said:

"The Tax Court rejected all of the evidence of all the witnesses, and upon a record containing

> no evidence whatever supporting them, sustained the Commissioner's determinations that the rents and salaries were excessive.
>
> Upon settled principles, it cannot do this, and in doing so, it erred." (cases omitted) Id. at 740.

Thus in at least two cases, the Court of Appeals had uniformly held that the Tax Court cannot ignore or reject uncontradicted and unimpeached testimonies in open court unless there is anything in the record to support a contrary finding.

In Foran, the taxpayer was the only witness as to what his intentions were and the court rightly acknowledged the fact that he knows best what his intentions are. Despite the fact that he was in the oil and gas royalty and brokerage business and he made no separate record of what property is to be held for sale and what is not, the Court accepted his testimony because it was consistent with every proven fact.

In Robinson Truck Lines, Mr. Robinson, the president, owned 99.6% of the stock of the corporation. Further, he owned practically all the terminal facilities used by the corporation. The two witnesses presented by the corporation were Robinson's employees. Id. at 741. Yet, because no evidence was presented to support

the Tax Court's belief and opinion that the president's salaries and rental of Robinson's facilities were excessive, the Court reversed the Tax Court's decision. It was not a question of credibility of the witnesses, but whether there was evidence to support a contrary finding.

In the case at bar, petitioner Severino's testimony and the undisputed facts prove that they intended to move to New York City. Documents supported the fact that they had to wait for several items in San Francisco before proceeding to New York. They worked only because they had to stay and wait in San Francisco and they left after receiving all the items they were waiting for. No evidence was presented to contradict or impeach petitioners' evidence. Obviously, the Tax Court did not believe petitioners but there was no evidence in the record to sustain the Tax Court's finding that petitioners "began to lay down permanent roots in San Francisco" and had other reasons to stay there while waiting for the several items they needed to proceed to New York.

CONCLUSION

It is respectfully submitted that the decision of the Tax Court be reversed and the case be remanded with directions to allow the deductions claimed and redetermine the deficiencies accordingly.

Respectfully submitted,

SEVERINO R. NICO, JR.

TERESITA V. NICO

7 East 14th Street, #625
New York, New York 10003

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SEVERINO R. NICO, JR. and TERESITA V. NICO, Petitioners-Appella	:	
v.	:	Docket No. 77-4090
COMMISSIONER OF INTERNAL REVENUE, Respondent-Appellee.	:	CERTIFICATE OF SERVICE BY MAIL

I, SEVERINO R. NICO, JR., petitioner-appellant pro se, hereby certify that on the 23rd day of June, 1977, service of Petitioners-Appellants' Brief was made by mailing three copies to Respondent-Appellee by post-paid mail, addressed as follows:

Mr. Gilbert E. Andrews
Chief, Appellate Section
United States Department of Justice
Washington, D.C. 20530

Severino R. Nico, Jr.
SEVERINO R. NICO, JR.